

February 27, 2004

Country of Origin Labeling Program
USDA Agricultural Marketing Service
1400 Independence Ave. SW
Mail Stop 0249
Washington, D.C. 20250-0249

VIA E-MAIL: cool@usda.gov

Re: Docket No. LS-03-04, Mandatory Country of Origin Labeling

To Whom It May Concern:

Please consider the following comments from Environmental Defense and Union of Concerned Scientists, The Institute for Agriculture and Trade Policy, Center for Science in the Public Interest, Natural Resources Defense Council, Jardiniere Restaurant, Acme Chophouse, Chefs Collaborative, Environmental Entrepreneurs San Francisco, CA, Alaska Oceans Program, Alaska Conservation Foundation, National Environmental Trust, Institute for Agriculture and Trade Policy, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, Sea Turtle Restoration Project, Coastal Alliance for Aquaculture Reform in response to the U.S. Department of Agriculture Agricultural Marketing Service's (USDA AMS's) proposed country of origin labeling (COOL) rule (68 FR 61943-85). As mandated by the Farm Security and Rural Investment Act of 2002,¹ along with the 2002 Supplemental Appropriations Act² and the 2004 Consolidated Appropriations Act,³ USDA must issue COOL regulations by September 30, 2004, requiring that retailers label fish and shellfish, or "seafood." These regulations build on AMS's October 2002 Guidelines for Interim Voluntary Country of Origin Labeling, for retailers who wished to implement COOL prior to the requirements becoming mandatory.⁴

COOL requirements are extremely valuable to consumers who purchase seafood

The undersigned organizations strongly support the statutory COOL requirements for labeling of fish and shellfish as to country of origin and whether they are farm-raised or wild-caught. COOL requirements are a valuable tool for consumers who wish to make more informed decisions about their seafood purchases. About three-quarters of the fish and shellfish consumed in the United States are now imported from abroad. Moreover, about one-third of fish consumed worldwide are now farmed, rather than wild-caught. The American public is largely unaware of these facts.

¹ 7 U.S.C.S. § 7901 *et. seq.* (2002).

² 7 U.S.C.S. § 1638a (2003).

³ H.R. 2673 (A)(VII) § 749.

⁴ Establishment of Guidelines for the Interim Voluntary Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts Under the Authority of the Agricultural Marketing Act of 1946, 67 Fed. Reg. 63367 (Oct. 11, 2002) [hereinafter Voluntary Guidelines].

In a survey of 1000 adults⁵ that eat fish at least once a month, the Seafood Choices Alliance found that more than half of those surveyed did not know if the seafood they purchased was wild-caught or farm-raised. The result is that U.S. consumers purchase seafood from a myriad of sources, but—because seafood labeling is often scanty – cannot distinguish among these choices at the retail counter.

Consumers may want to know about the country of origin of seafood for a number of reasons. Overfishing in many parts of the world is a concern for some consumers who would prefer to purchase fish from places where fish stocks are relatively well managed. Even with the passage of Homeland Security legislation, less than two percent of imported food is inspected by the Food and Drug Administration, and consumers may wish to avoid seafood from certain countries that they believe may be comparatively hazardous. Farmed seafood (e.g. salmon) may differ from wild seafood in taste, texture, oil content, and level of contaminants.⁶ Similarly, a type of seafood that comes from many countries may have different attributes depending on country of origin. For example a northern shrimp from Canada (*Pandalus* spp.) is from a different taxonomic genus and has a somewhat different flavor than shrimp from Ecuador (*Litopenaeus* spp.) – yet a consumer may not be able to distinguish them visually if the shrimp are peeled and of similar sizes.

COOL requirements are not designed to directly address these and other issues that may concern consumers. However, for the foreseeable future, it is unlikely that other mandatory labels will address these issues, which many consumers care about deeply. At present, even very knowledgeable consumers are often in the dark when they purchase seafood. COOL requirements are a simple approach to give consumers critical information that will help them to make more informed decisions in the marketplace.

AMS argues in the proposed rule that if COOL were really desirable to consumers, the marketplace would provide COOL on a voluntary basis⁷ (although, of course, Congress has mandated COOL). AMS's analysis depends heavily on a study, Umberger et al., concerning beef labeling. However, Umberger et al.'s and other analyses may not apply to seafood, which is far more likely to be imported from other countries than beef -- and, unlike beef, comes from two distinct types of production systems (wild capture and fish farming). In fact, our experience as consumers is that some retailers do label seafood as to its source. That said, such labeling is erratic and can be inconsistent, and seafood is far less likely to be labeled for foreign than domestic origin. Hence COOL requirements are essential.

Making COOL an effective tool for consumers requires that as many retailers as possible be labeled

Congress designated those who must comply with COOL as "retailers" as defined under the Perishable Agricultural Commodities Act (PACA).⁸ PACA defines "retailer" as a business

⁵ Seafood Choices Alliance. The Marketplace for Sustainable Seafood: Growing Appetites and Shrinking Seas (June 2003).

⁶ Hites et al. 2004. *Science* 303: 226-229.

⁷ Proposed rule 61956-57.

⁸ COOL § 281(6).

engaged in the selling of fresh and frozen fruits and vegetables at retail with an annual invoice of more than \$230,000.⁹ Thus fish markets or any other establishment not falling under the PACA definition will be exempt from COOL requirements. This definition could result in an exemption for a significant amount of the seafood actually sold to consumers, particularly more expensive types of seafood that tend to be sold in specialty markets rather than in standard supermarkets. AMS rightly points out that this definition allows suppliers of covered commodities to avoid regulations by distributing products through channels other than to the retailers subject to the law.¹⁰ Additionally, when some retailers are required to label and comply with record keeping requirements, while others selling identical commodities are not, this results in an uneven “playing field.”

AMS has not requested any comments on this issue, because this exemption exists at the statutory rather than the rulemaking level. However, in its report on COOL, the General Accounting Office has suggested that the Secretary of Agriculture propose that Congress include fish markets under the definition of “retailer” through a technical correction.¹¹ We urge USDA to recommend to Congress that the current definition of retailer be altered so that it includes fish markets and other specialty markets.

The definition of "processed food items" as it applies to fish and shellfish, should be revised so that a broader range of seafood products is subject to labeling.

AMS requests comments on alternative definitions of “Processed Food Item.”¹² How this term is defined can make a significant difference in the percentage of seafood that ends up being subject to COOL requirements. We find overly narrow the agency's preferred option, a two-step approach.

Under AMS's preferred approach, processed foods are first defined as items that have undergone physical or chemical change so that they no longer retain the characteristics of the original covered commodity. Examples include fish sticks and smoked fish products. We strongly disagree with AMS's proposal to exclude smoked fish products. These items are still identifiable to consumers as the original commodity (e.g. consumers identify smoked salmon as salmon), and should be subject to country of origin labeling. As with non-smoked commodities, smoked fish such as salmon may vary in flavor, texture, oil content, and levels of contaminants depending on whether it is farmed or wild and its country of origin.

Second, retail items derived from fish or shellfish that has been combined with another covered commodity or other substantive ingredients (i.e. seafood medley) are also defined as processed. This could simply be a mix of covered commodities with no substantive additives. We disagree with the latter exemption. A simple mixture of covered commodities with no substantive additives is not truly altered from the covered commodities original state and AMS should require country of origin labeling.

⁹ Perishable Agricultural Commodities Act of 1930, 7 U.S.C. 499 *et. seq.*

¹⁰ Proposed rule at 61954.

¹¹ GAO Report, *supra* note 32.

¹² Proposed rule at 61946-61947.

We support an alternative definition of "processed" suggested by AMS: A commodity would not be excluded under the processed food exception unless it is mixed with other commodities so as to create a distinct food.¹³ Examples provided by AMS include a pizza or a TV dinner. This option is preferable to others because it would not exclude commodities that had undergone only modest alterations and were still identifiable to consumers as their original form (e.g. a seafood mixture of covered commodities with no substantive additives).

We strongly oppose other alternative definitions considered in the proposed rule because they would exclude an even greater proportion of seafood from labeling than AMS's preferred option.

The labeling of products of mixed-origin should be more specific

The proposed rule allows fish or shellfish to be labeled as originating from a particular country, even though the fish or shellfish was caught or farmed elsewhere.¹⁴ Such labels are misleading. In most cases, a consumer who reads a label that says "Product of Country X" will likely think this means that the fish in question came from the waters of Country X, when in fact the label only indicates where the fish was processed. The proposed rule also allows such products of mixed origin to be labeled as "Product of Country X, harvested in U.S. waters." This label is much more helpful in providing consumers with accurate information. Therefore we recommend that mixed origin seafood products be appropriately labeled to reflect each country involved in the production process (capture/farming country, processing country).

The origins of blended products be listed according to weight

AMS's October 2002 Voluntary Guidelines specified that when one product contains commodities of multiple countries of origin, the origins are to be listed according to weight. The proposed rules instead adopt the alphabetical listing requirement. This change was due to comments from affected industries arguing that production methods made listing according to weight highly impracticable.¹⁵ For consumers, listing according to weight is the more desirable approach as it provides more information – consumers can identify which countries provide the more and less substantial portions of the product they purchase. We urge that AMS require listing by weight in the final rule.

Labeling should be required for remotely purchased products

A consumer's ability to take a product's country-of-origin into consideration when making purchases is undermined by the proposed rule allowing COOL to be given at time of delivery for remotely purchased products (such as catalog and internet sales), rather than at the time of purchase. But if consumers are to use country of origin labeling as a basis for their purchasing decisions – the intent of the law¹⁶ -- consumers must be made aware of the country of origin of a covered commodity before the purchase is made, and not upon delivery! Consumers may, for example, have very different views of wild Alaskan salmon versus farmed Atlantic salmon from

¹³ Proposed rule at 61947.

¹⁴ Proposed rule at 61949.

¹⁵ Proposed rule at 61950.

¹⁶ Proposed rule at 61945.

Scotland, since a recent study documented that the former has significantly lower levels of contaminants than the latter.¹⁷ While many have commented on the difficulty of providing up-to-date country of origin information on an Internet site or catalog, it is no more difficult than keeping an accurate inventory for accounting and shipping purposes. Websites, in particular, are easy to update. Allowing a blanket exception to COOL requirements for remotely purchased products is unwarranted and contradicts the purpose of COOL.

The definition of farm ‘raised’ fish and shellfish should be expanded.

As proposed under §60.125, farm-raised fish and shellfish are "grown by means of aquaculture management techniques from the period of time from hatched to harvested." However, not all farm-raised fish and shellfish are hatched in captivity. For example, although the use of shrimp hatcheries for stock is becoming more common, many shrimp farms in developing countries still stock their ponds with shrimp post-larvae caught in the wild. Shrimp from these farms are arguably excluded under the proposed definition, but would be considered farm-raised by most people. Similarly, researchers have not been able to complete in captivity the life cycle for eels, and eel farms are thus stocked with wild caught elvers. A new definition of farm-raised should be written to include fish and shellfish that is cultivated for the majority of its life, but is originally obtained from the wild.

The USDA should not consider self-certification as an alternative to mandatory country of origin labeling.

AMS has taken the position that the statute would not allow for self-certification, and that such a system would be highly vulnerable to misrepresentation without a mechanism by which AMS can verify compliance.¹⁸ We strongly agree with this position and AMS's rationale for it.

Seafood labeling should not be excessively costly

USDA argues that COOL requirements will be costly to industry.¹⁹ USDA bases its conclusion on a number of analyses, most of which apply to meat products, and only one of which focuses on seafood. This one analysis, by Sparks/CBW, estimates that the cost of COOL requirements for all U.S. seafood producers will be an extremely modest \$1 million, and that the total costs of COOL requirements for seafood producers, processors, and retailers will be \$66-86 million.²⁰ USDA argues that the estimates by Sparks/CBW are too low, without providing a detailed rationale.²¹ USDA's argument may thus be regarded as arbitrary and capricious. USDA also appears to have ignored factors that minimize or at least moderate the costs associated with COOL labeling for seafood. For example, USDA argues that the Sparks/CBW estimate is too low in part because producers of wild-caught fish will need to maintain and transfer records on where fish are harvested and also transfer information on whether the vessel is U.S.-flagged. But

¹⁷ Hites et al. 2004. *Science* 303: 226-229.

¹⁸ Proposed rule at 61944.

¹⁹ Proposed rule at 61956-74.

²⁰ Proposed rule at 61961.

²¹ Proposed rule at 61966.

the National Oceanic and Atmospheric Administration already has record-keeping requirements for fishing vessels²² that are pertinent to COOL requirements. Similarly, USDA argues that fish farming operations will need to maintain and transfer information regarding the location of production and the origin of fish into the operation. But most U.S. fish farms are small or mid-sized operations²³ with only U.S. locations. Moreover, they tend to obtain their stock from within the United States. As a result, record keeping should be relatively straightforward and inexpensive for producers of both wild-caught and farmed seafood.

Thank you for your consideration.

Yours truly,

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²² These requirements vary among fisheries.

²³ USDA-NASS 1998 Census of Aquaculture